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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 297

GRAHAM-WHITE SALES CORPORATION, a foreign corporation, and D. ALLCOTT KELLY, as President of Graham-White Sales Corporation,

Appellants,

vs.

THE PRIME MANUFACTURING COMPANY, a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

REPLY TO APPELLEE'S MOTION TO DISMISS

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Appellee charges that the Appellants' statement of the case is incomplete. Appellants' statement was prepared so as not to burden this Court with facts not material on this appeal. Many such extraneous facts are included in Appellee's restatement of the case.

Appellee also asserts in its restatement that a certain statement in the written opinions of the Trial Court and Wisconsin Supreme Court constitutes a finding of fact

which must be accepted by this Court. The statement is that the installation of a telephone answering service is not indicative of an intention to abandon the office or the business but is consistent with the continuation of business.

We submit that this statement is a legal conclusion in this particular case which begs the federal issue presented by this appeal. A determination of the federal issue depends primarily upon whether the Sales Corporation *ceased* having sufficient contacts in Wisconsin for purposes of state jurisdiction even though a telephone answering service referred all persons calling leased space in a Milwaukee office building *to the corporate office in the State of Virginia.*

Appellee, in effect, would make the highest state court the final authority in this field of federal constitutional law. To prevent such result, this Court ascertains for itself the facts disclosed by the record when reviewing an issue of jurisdiction over a foreign corporation. *Consolidated Textile Co. v. Gregory,* 289 U.S. 85, 86 (1933), *Truax v. Corrigan,* 257 U.S. 312, 324-325 (1921).

I.

The question presented is substantial.

Sufficient contacts must exist *at the time of the service of the summons* to comply with federal due process in this case. See *Conley v. Mathieson Alkali Works,* 190 U.S. 406 (1903), *Consolidated Textile Co. v. Gregory,* 289 U.S. 85, 88 (1933) and §262.09(4)(a). It was on this basis that the question presented on this appeal was drafted as set forth in the Jurisdictional Statement.

We wish to emphasize that the Wisconsin courts, and the question presented as redrafted by Appellee, overlook

the time factor which is all-important in this case. The record discloses, without dispute, that *at the time of the attempted service of process* all telephone inquiries to the leased Milwaukee office were automatically referred by telephone answering service to the corporate offices located in the State of Virginia and that all inquiries mailed to such Milwaukee office were immediately sent by the postal authorities to the same offices in Virginia. This, with Mr. Kelly's uncontradicted sworn statement (R. p. 44-45), conclusively establishes a cessation of business activity in the State of Wisconsin notwithstanding the observation of the Wisconsin Supreme Court that there was no publication to the trade advising that the Milwaukee office was closed and that inquiries should be addressed elsewhere. The response to mail and telephone answering arrangements obviously advised the trade that the Milwaukee office was not open for business.

A corporation ceasing to do business in a state perhaps normally should actually have its telephone instruments disconnected. However, by the outstanding and published telephone directory in general use at the time unanswered telephone callers were directed to Kelly's residence. To obviate the problem presented the modern means of a telephone answering service was retained to have such inquiries automatically referred to the Virginia office. Kelly had the right to continue to reside in Milwaukee without rendering the corporation amenable to service of process. *Conley v. Mathieson Alkali Works,* 190 U.S. 406, 411 (1903) and *Riverside Mills v. Menefee,* 237 U.S. 189, 194-195 (1915). He also was not required to have his residential telephone disconnected and a change in his private number would not have solved the problem presented by the telephone directory then in use. Obviously the best method available to handle the situation

was to install a telephone answering service directing callers to Virginia, which was done.

Nor does the fact the lease remained outstanding demonstrate that the Sales Corporation had not ceased business activity in Wisconsin. See *Davega, Inc. v. Lincoln Furniture Mfg. Co.*, 29 F (2d) 164, 166 (2d Cir. 1928). Under the lease Kelly and the Sales Corporation remained liable for the payment of rent until the premises were sublet to third persons, which required the consent of the lessor.

The burden was upon Appellee to show that the Sales Corporation was doing business in Wisconsin *at the time of the service of the summons* so as to confer jurisdiction upon the Wisconsin Courts under §262.09(4)(a). Appellee failed to carry such burden, and the legal conclusions drawn by the Wisconsin Courts to "correct" such omission were erroneous. The judgment of the Wisconsin Supreme Court holding the Sales Corporation amenable to service of process under the circumstances certainly presents a substantial federal question for review by this Court.

Appellee's motion to dismiss is premised upon three additional arguments. We will refute them herein in the order presented by Appellee.

II.

The Judgment appealed from is "final" within the meaning of Title 28 USC §1257.

Appellee contends that the judgment of the Wisconsin Supreme Court is not "final" for the purposes of appeal under 28 USC §1257(2). Appellee in effect argues that the Sales Corporation must either (a) submit to a trial on the merits, whereby the federal question on

jurisdiction may be waived under Wisconsin practice and not be subject to review by this Court*, or (b) suffer a default judgment in the Wisconsin Courts and then raise the federal issue on appeal to this Court from such default judgment.

We earnestly submit that the Sales Corporation should not be required to permit entry of default judgment against it or defend on the merits as a condition to review by this Court of the federal issue. Requiring the Sales Corporation to *defend* on the merits at this time would contravene and thwart the basic underlying reason for the "minimum contacts—fair play" rule and this appeal. Such reason was well stated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) at page 317:

> "To require the corporation in such circumstances to *defend the suit away from its home* or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with *due process.* (Italics supplied)

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*The Wisconsin Supreme Court in *Corbett v. Physicians Casualty Association*, 135 Wis. 505, 115 N.W. 365 (1908) held that a defendant who makes *any appearance*, including going to trial on the merits under protest, after an objection to jurisdiction over his person is overruled waives the jurisdictional issue. The Wisconsin courts are very strict in applying this rule, which may be validly applied by state courts after appeal on the jurisdictional issue to an appellate court and even though a contrary rule of practice prevails in the federal courts. *Western Indemnity Co. v. Rupp*, 235 U.S. 261, 272-273 (1914).

However, the federal question then would not be reviewable here, the situation apparently being within the settled rule that this Court will not review a state court judgment resting on an adequate and independent non-federal ground even though the state court may also have summoned to its support an erroneous view of federal law. See *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945) wherein this Court refused to review a federal question involving jurisdiction of the Federal Communications Commission because the right to contest the issue was waived under state procedure.

In any event, for purposes of review the judgment appealed from should be treated as the equivalent of a refusal by the Wisconsin Supreme Court to issue a writ of prohibition.

A state court judgment refusing a *writ of prohibition* to prevent the exercise of jurisdiction over a foreign corporation is final for purposes of review by this Court under *28 USC §1257. St. Louis B & M Ry. v. Taylor,* 266 U.S. 200 (1924), see also *Bandini v. Superior Court,* 284 U.S. 8, 14 (1931) and *Madruga v Superior Court,* 346 U.S. 556 (1954). The writ formerly was available to obtain review by the Wisconsin Supreme Court and subsequent review by this Court of an objection by a foreign corporation to jurisdiction. See *Petition of Inland Steel Co.,* 174 Wis. 140, 182 N.W. 917 (1921) and *Consolidated Textile Co. v. Gregory,* 289 U.S. 85 (1933). However, this avenue for review by this Court of the federal question was not open to Appellants because Wisconsin Statute §274.33(3) was amended effective September 1, 1956, to make orders which "decide a question of jurisdiction" directly appealable. The extraordinary writ of prohibition is not available in Wisconsin under such circumstances. *State ex rel Joyce v. Farr,* 236 Wis. 323, 295 N.W. 21 (1940) and *State ex rel Fieldhack v. Gregorski,* 272 Wis. 570, 76 N.W. (2d) 382 (1956).

We submit that, in view of all the circumstances, the judgment appealed from is final for purposes of review by this Court under Title 28 USC §1257.

III.

The Federal question was passed on by Wisconsin Supreme Court.

Appellee also contends that the question sought to be reviewed was not timely or properly raised. We believe it unnecessary to labor the point since Appellee correctly concedes (Brief, p. 13) that where the highest state court expressly considers and determines the question, this Court will assume that the federal issue was properly raised. *Saltonstall v. Saltonstall,* 276 U.S. 260, 267-268 (1928) and *Charleston Ass'n. v. Alderson,* 324 U.S. 182, 185-186 (1945).

Appellee, however, also contends that the Wisconsin Supreme Court did not pass on the federal question. In so doing Appellee overlooks the fact, as noted on page 6 of our Jurisdictional Statement, that the Wisconsin Supreme Court stated in the instant case:

> "In the recent case of *Behling v. Wisconsin Hydro Electric Co.* (1957), 275 Wis. 569, 572, 573, 575, N.W. (2d) this court, stating that 'Questions of jurisdiction acquired by the service of process on a foreign corporation depend upon whether or not there has been compliance with the due-process provision of the federal constitution, regarded as controlling *International Shoe Co. v. Washington* * * *.'"

(Appendix A, p. 15, R. p. 172)

We also wish to reiterate the argument advanced on pages 5-8 of the Jurisdictional Statement, that any decision of the Wisconsin Supreme Court deciding whether a foreign corporation is "doing business in Wisconsin at the time of service" as required under §262.09(4)(a) *necessarily* passes upon the federal question. The statute is treated by the Wisconsin Supreme Court as being co-

extensive with and requiring no more than federal due process (*Huck v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 4 Wis. 2d 132, 137, 90 N.W. 2d 154, 157-158), which also is a complete answer to Appellee's contention that the appeal must be dismissed because any decision by the Wisconsin Supreme Court upon the federal issue was unnecessary to a determination of the cause.

The Wisconsin Supreme Court concluded its opinion as follows:

> "These activities constitute at least the 'very little more' than the maintenance of an office for convenience in the solicitation of orders, required under the rule, and the trial court was warranted in holding that the Sales Corporation was amenable to service in Wisconsin on May 24 and June 3, 1957."

(See Appendix A, p. 18, R. p. 174)

Appellee erroneously contends that this statement acts as an adequate independent non-federal grounds sufficient to bar a review. However, application in any particular case of the non-federal "rule" referred to by the Wisconsin Supreme Court is not necessarily adequate, and always is subject to review in cases of this type on the basis that such application violates minimum federal constitutional requirements. Appellee's contention again (a) begs the very question upon which Appellants seek review by this Court, and (b) would make the highest state court the final authority in this field of federal constitutional law.

CONCLUSION

For the reasons advanced herein and in the Jurisdictional Statement, it is respectfully submitted that Appellee's Motion to Dismiss should be denied. A substantial federal question is properly presented for review by this Court on appeal or by way of certiorari as authorized under Title 28 USC §2103.

Respectfully submitted,

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